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IN THE

Supreme Court of the United States

1971 TERM

70-275

No. 1820

BERNARD LAFER,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

BECKERMAN, FRANZBLAU AND COHEN,
Attorneys for Appellant,
1180 Raymond Boulevard,
Newark, New Jersey, 07102.

S. M. CHRIS FRANZBLAU,
Of Counsel.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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STATE OF NEW JERSEY,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Appellant Bernard R. Lafer appeals from the judgment of the Superior Court of New Jersey, Appellate Division, entered January 20, 1971. A petition for certification to review this judgment was denied by the Supreme Court of New Jersey on March 15, 1971. The judgment appealed from is a judgment of the Superior Court of the State of New Jersey, Law Division, Essex County, dated December 18, 1969, in which defendant was convicted of the crime of embezzlement. This jurisdictional

statement is submitted to show that the Supreme Court of the United States has jurisdiction for review by *certiorari* and that substantial federal questions are presented.

Opinion Below

The opinion of the Superior Court, Appellate Division, is not reported and is reprinted herein as Appendix A. The order of the Supreme Court of New Jersey denying certification is reprinted herein as Appendix B. The Notice of Appeal to this Court is reprinted as Appendix C.

Jurisdiction

The jurisdiction of this Court to review the judgment below by *certiorari* is conferred by 28 U.S.C. 1257(3).

The proceeding below was tried in the Superior Court, Law Division, Essex County, on December 16-18, 1969, wherein defendant was convicted of the crime of embezzlement. The judgment of the Superior Court, Appellate Division, affirming the judgment of the Superior Court, was entered on January 20, 1971. A Petition for Certification was denied by the New Jersey Supreme Court on March 15, 1971. Appellant therefore applies to this Court to review the judgment in question by Writ of Certiorari.

Statement of the Case

Defendant Bernard Lafer is a New Jersey lawyer who represented Concepcion Rivera, individually and as guardian of her infant son, George Rivera, in a negligence action. This matter stems from the disposition of ap-

proximately $6,000.00 of the proceeds of the settlement of that action. Pursuant to an order of the Surrogate's Court, this money was to be deposited in the Robert Treat Savings & Loan Association. However, with the alleged consent of Mrs. Rivera, the defendant agreed with Mrs. Rivera to pay her interest on said sum if he could use this amount, the money being always available if Mrs. Rivera needed it. Approximately two years from the award, Mrs. Rivera went to the Hon. Judge James R. Giuliano, the Assignment Judge of Essex County, with regard to the sums being used by defendant. Judge Giuliano then had a conference with the defendant on June 2, 1969, in which he advised the defendant of his conversation with Mrs. Rivera.

At the trial of the matter, the Judge testified that he advised the defendant as follows: "I intended to send the matter to the Ethics Committee and ask the prosecutor to proceed unless something was done. I then advised Mr. Lafer that I did not want him to give me an explanation unless he wanted to willingly. I said to him, 'I am just advising you as a judge to a lawyer' and then I added, 'It seems to me that there is no reason why this woman should have not received her $7,500.00.'" (Transcript at page 70.)

Defendant chose to give no explanation of the circumstances to Judge Giuliano and immediately forwarded a check in the amount of $6,224.60 on June 10, 1969 to Mrs. Rivera. This figure included all accrued interest on the use of said funds by defendant Lafer. Fifteen hundred dollars ($1500) was previously paid to Mrs. Rivera when she requested it for doctor bills.

At the trial, Concepcion Rivera, the alleged complainant, was not called upon to testify by the prosecution, al-

though she was under subpoena. It therefore appears the only evidence of the alleged crime was the indirect testimony given at trial by Judge Giuliano.

The State obtained an indictment apparently upon the testimony of Mrs. Rivera, although she was never asked about her knowledge of, consent to, or acquiescence in defendant's alleged use of her money, nor was she so questioned at the trial. Defendant sought a complete copy of the Grand Jury transcript, which had been so Ordered by the Court. However, since the Reporter had moved to California, there was an inordinately long delay in transcribing the testimony. When the testimony was finally received, it was found to be completely inadequate, in that it did not give a full account of the proceedings and material matters were obviously missing. The transcript did not include any testimony by Mrs. Rivera and in spite of defendant's motion for an adjournment, the matter was tried within a week after receipt of the Grand Jury transcript, also contrary to a Court Order.

On appeal to the Appellate Division, the judgment of the Superior Court was affirmed.

ARGUMENT

POINT I

Defendant was denied procedural due process of law as guaranteed by the Fifth Amendment and as incorporated through the Fourteenth Amendment when the questioning of Judge Giuliano was deemed to be non-custodial and when defendant's silence was admitted into evidence as an admission by silence.

"AMENDMENT V. CAPITAL CRIMES; DOUBLE JEOPARDY; SELF INCRIMINATION; DUE PROCESS, etc.

"No person . . . shall be deprived of life, liberty or property without due process of law . . ."

"AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT.

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . ."

Defendant contends that the situation of confrontation by a judge under the circumstances here present (particularly where a "promise" to refer the matter to the Prosecutor has been made) has much the equivalent of

an arrest or a custodial arrangement as is the arrest by any law officer. The existing cases, in particular *Miranda* v. *Arizona,* 384 U.S. 436 (1966), as well as the clear trend in constitutional law, demand protection for defendant's silence. This was indeed not a "private" colloquy between the defendant and Judge Giuliano, since the conversation was taken down stenographically in chambers upon a promise of prosecution after defendant was apprised of his right to remain silent.

The Superior Court, Appellate Division, found no arrest or custody situation (Appendix page 7a) and stated that "we do not agree with the defendant that a private colloquy between a judge and a member of the bar such as took place here provides an occasion for the invocation of the criticism which has very properly resulted in attenuating the force and scope of the doctrine of assenting silence when applied to the kind of in custody situation to be found in the authorities cited above."

The defendant maintains, however, that the situation at bar should fall within the scope of *Miranda,* since defendant contends a custodial and accusatory situation arose. Clearly the investigation by the Judge "focused" in on defendant. Since the questions were of an incriminatory nature, the Judge's warning to defendant that he need not answer was indicative of the Judge's suspicion of wrongdoing. Defendant was obviously aware of his constitutional rights and the potentially self-incriminatory nature of his statement since he was a lawyer. This situation should fall within *Miranda,* wherein the Court stated that where an accused is—

> ". . . otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning . . ." 384 U.S., at 478.

In the alternative, defendant contends that the doctrine of assenting silence whereby the silence of the accused is subject to comment by the prosecutor, should be declared violative of due process and fundamental fairness. As noted in *State* v. *Garcia,* 83 N. J. Super. 345 (App. Div. 1964); 199 A. 2d 860, and the Appellate Division opinion in the instant case, the doctrine has been widely criticized because of the "uncertainty which attends interpreting an accused's silence as an implied admission of the statement made."

In 1960, *State* v. *Butler,* 32 N. J. 166 (160 A. 2d 8) the Court recognized the diversity of opinion with regard to this doctrine. In *Garcia,* it was pointed out that because of the trend away from the use of admissions by silence, a reexamination of the doctrine was in order. In addition, as noted in 112 *Pennsylvania Law Review* 210 (1963), in an article entitled "Tacit Criminal Admissions", New Jersey was in the minority of jurisdictions accepting even limited use of the doctrine. It was also stated that there was a diversity among the Federal Courts as to the doctrine's acceptance.

Because of the accusatory nature of the Judge's questions, use of the doctrine should not be permitted in the case at bar. The defendant here was expressly told by Judge Giuliano of his right to remain silent in recognition of the seriousness of the matter with which he was confronting defendant. The defendant elected to remain silent under the circumstances and his silence has been used against him in the nature of an entrapment. Defendant was obviously placed on the horns of a dilemma; i.e. to either talk and incriminate himself or remain silent and incriminate himself, in violation of his Fifth Amendment privilege against self incrimination.

POINT II

The admission of the testimony of Judge Giuliano was highly prejudicial, and its admission amounted to a denial of due process of the defendant's right to a fair trial.

The New Jersey Supreme Court adopted, pursuant to its rule-making power, *Winberry* v. *Salisbury*, 5 N. J. Super. 30, Aff'd 5 N. J. 240 (1949), Rule 4 of the 1967 *Rules of Evidence* which provided:

> "The judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will either (a) necessitate undue consumption of time, or (b) create danger of undue prejudice or of confusing the issues or of misleading the jury."

The intent and purpose of this rule is obvious. The function of the trial judge in his discretionary power of admitting or excluding certain evidence is to keep from the record certain prejudicial evidence which would so outweigh its probative worth as to prejudice the case as a whole. This principle was previously recognized in the body of case law prior to its formal adoption as a rule of court. *State* v. *West*, 29 N. J. 327, 335 (1959); *Stoelting* v. *Hauck*, 32 N. J. 87 (1960).

In the present case, the trial judge allowed testimony of a conversation between the defendant Lafer and Assignment Judge Giuliano, through the direct examination of Judge Giuliano. The particularly prejudicial testimony consisted of the following:

> "I intended to send the matter to the Ethics Committee and ask the Prosecutor to proceed un-

> less something was done. I then advised Mr. Lafer that I did not want him to give me an explanation unless he wanted to willingly. I said to him 'I am just advising you as a judge to a lawyer' and then I added 'it seems to me that there is no reason why this woman should not have received her $7,500.'" (Transcript at page 18.)

This testimony consisted of a legal conclusion, and judicial determination by Judge Giuliano that based on the information before him, the matter should be turned over to the Prosecutor of the County, since a crime had been committed by the defendant Lafer.

If the Assignment Judge of the County felt that the Prosecutor should proceed on this complaint by Mrs. Rivera, and that there was "no reason" for the defendant Lafer's failure to return the money, what inference must the jury have drawn on this pronouncement? The question needs no answering. The guilty verdict which resulted therefrom was the only proper choice for the jury presented with this highly prejudicial evidence.

The Superior Court, Appellate Division, felt that this evidence was cured by the instruction to the jury by the trial judge. The instruction was:

> "Ladies and Gentlemen, I will inform you now and I will mention this again in my charge, that you are not to draw any inferences against the defendant simply because a judge of this court stated that he was sending the matter to the Ethics Committee and in turn to the Prosecutor. That does not in any way, shape or form imply guilt on the part of the defendant. It was admitted solely for the purpose of a presentation of what transpired and what may have then come after."

The Appellate Division dismissed this argument by stating: "We deem the curative instruction, fortified by repetition in the charge and as clarified by the statement last above quoted as having sufficiently exorcised or neutralized any unfair prejudice which might have otherwise existed. If we are to believe in a jury system, as we do, we must believe a jury to be capable and willing to react responsibly to so clear and definite an admonition." (Appendix page 6a-7a.)

The present language of the Superior Court, Appellate Division, is directly analogous to the thinking of the long line of conspiracy cases in the pre-*Bruton* era. It is this type of danger that the Court recognized in *Bruton* v. *United States,* 391 U. S. 123 (1967), where the jury would be confronted with the admission or confessions of a co-defendant, that the court required severance of the co-defendant. The weaknesses of our jury system in distinguishing evidential questions in a matter of common knowledge. This type of choice and the admission of a co-conspirator which would be attacked on cross-examination is no less prejudicial than the unimpeachable, highly prejudicial testimony of the Assignment Judge in *Lafer.*

The general rule is that a defendant is entitled to a fair trial, not a perfect one. *Lutwak* v. *United States,* 344 U. S. 604, 619. In the present case this fair trial was denied the defendant Lafer. The jury before whom he was tried was called upon to follow the instructions of the trial judge in a situation which was almost beyond the human limitations for them to do so. This task could not reasonably have been followed by the jury in light of the highly prejudicial testimony of the Assignment Judge.

As Mr. Justice Jackson said in his concurring opinion in *Krulewitch* v. *United States,* 336 U. S. 440, 453: "The

naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction***" The import of this passage can only be placed in its proper perspective by reading the cursory treatment of this issue by the Superior Court, Appellate Division. See also Judge Learned Hand's sharp criticism of the jury system in *Delli Paoli,* 229 F. 2d 319.

The particular testimony was most prejudicial to the defendant Lafer and the relevance to the proof of the commission of the crime charged was negligible. In view of the adoption of Rule 4 of the *New Jersey Rules of Evidence,* which requires the trial judge to weigh the potentially prejudicial testimony with its probative value, plain error resulted when the trial judge allowed the testimony of the Assignment Judge as to his legal conclusions of the conduct of the defendant Lafer.

POINT III

Failure to supply defendant with the complete copy of the grand jury transcript as had been ordered by the court and as required by the New Jersey Rules of Practice, deprived defendant of an opportunity to adequately prepare his defense in violation of defendant's Sixth and Fourteenth Amendment rights.

"AMENDMENT VI. JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district

shall have been previously ascertained by law, *and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;* to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense." (Emphasis added)

N. J. Rule 3:6-6(b) states:

"A stenographic record or sound recording shall be made of all testimony taken before the grand jury, but a transcript thereof shall be made only at the prosecutor's request or upon an order of the Assignment Judge or other judge designated by him entered pursuant to a motion authorized by R. 3:13-3."

Rule 3:13-3 states:

"(a) MATERIALS DISCOVERABLE BY DEFENDANT AS OF RIGHT. Upon motion made by a defendant, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any relevant . . . (3) defendant's grand jury testimony."

Pursuant to the above rules of the New Jersey Court, an Order was entered by the Court to provide defendant with a complete and properly certified copy of *all* testimony before the Grand Jury relating to the offense charged. The necessity for this information is obvious in the preparation of defendant's case for trial. Not only was the information late in reaching defendant, but more importantly, significant portions were omitted, including statements by the complainant, Mrs. Rivera, as well as a letter

from her. Receipt of the transcript of the statements of the complainant were critical, since the information was necessary in order that defendant prepare for proper confrontation of witnesses, in addition to the requirement that the accused be informed of the nature and cause of the accusation. The Sixth Amendment rights of defendant were clearly in jeopardy.

In Federal, as well as New Jersey courts, prior to 1967 there was no requirement for the recordation of the proceedings of the grand jury. See *United States* v. *Borys,* 169 F. 366 (Alaska 1959); *United States* v. *Rosen,* 259 F. Supp. 942 (S. D. N. Y. 1966); *State* v. *DiModica,* 40 N. J. 404, 192 A. 2d 825 (1963). However, in the revision of the New Jersey Rules in 1967, there is a provision, namely Rule 3:6-6(b), which provides for recordation of grand jury proceedings in New Jersey. Such a recordation was made of defendant's grand jury proceedings in the instant case. The failure to provide such information was therefore not only in direct conflict with the purpose and intent of the New Jersey Rules, but also the Order of the Judge, which Order stated that such transcript be provided in its full and complete form, pursuant to Rule 3:13-3.

It is the obvious intent of the New Jersey Rules in providing for the copies of the transcript of grand jury proceedings to conform with an expanded view of the Sixth Amendment, as well as Fifth Amendment rights of due process of law, which is incorporated into State actions by the Fourteenth Amendment. The failure to provide this transcript is clearly a denial of defendant's Sixth Amendment rights "to be informed of the nature and cause of the accusation." Where defendant relies upon a court order that he will receive this information in or-

der to properly prepare his defense and such order is in conformity with the rules and practice of the court, the failure to provide this transcript is a denial of fundamental fairness and due process of law. In the alternative, it is error not to provide a postponement to make other preparation for failure to get a complete transcript.

POINT IV

Failure of the State to call the complainant as a witness deprived defendant of a right to confrontation of witnesses as guaranteed by the Sixth Amendment and denied defendant a fair trial as required by Fifth Amendment due process of law.

During the presentation of its case, the State did not call Mrs. Rivera as a witness to testify against defendant. It therefore appears that the defendant was convicted of the crime of embezzlement while there was no direct complaining witness against him. On the second day of trial, it became known to defendant that Mrs. Rivera was under subpoena by the State and had had numerous discussions with the prosecution with regard to her possible testimony. There were no written statements by Mrs. Rivera and apparently, without having any prior oral statement, the State concluded that Mrs. Rivera was a hostile witness.

It was the belief of the defense at the conclusion of the first day of trial that Mrs. Rivera would be called to testify since she obviously had relevant knowledge of the facts of the case. However, when it became known that she would not testify and the plaintiff sought to procure her as a witness, it was then learned that Mrs. Rivera was under subpoena by the State. It is apparent that

the implications of the subpoena upon her and her fear or concern generated from conversations with the prosecutor as to a possible collateral law suit against her, so intimidated her that although she was not called by the State, she became effectively unavailable by the defense. When the State offered this witness to the defense during the second day of trial, the defense counsel had no alternative but to turn the offer down because of the substantial possibility that her testimony, at this point, may have been tainted because of the intimidation by the State. It therefore appears from this situation that indeed there was no complaining witness against the defendant and thus, the State shifted the burden of proof of coming forward to the defense.

The Sixth Amendment to the United States Constitution specifically provides that in criminal prosecutions the accused has the right to be confronted with the witnesses against him. It is obvious from the situation that developed at trial, that the complaining witness in the instant case was not called to testify and therefore, there was no confrontation of witnesses. This fact, in conjunction with the facts stated in Argument III, that the testimony and letters of Mrs. Rivera during the grand jury testimony were not presented to the defense, results in the conclusion that at no time during the entire proceeding was the defense aware of the nature and substance of the claims made by Mrs. Rivera against the defendant. This position is further buttressed by the inadequate time for preparation after receipt of an incomplete transcript.

Fifth Amendment due process demands that there be no misconduct, intentional or inadvertent, in the criminal process. Failure to produce Mrs. Rivera therefore denied defendant his right to confront witnesses against him

and denied him his right to cross examination. This strategy is too much like a chess game. There was no way for defendant to rebut the testimony, since no complaining witness was offered at trial. The lack of confrontation of the complaining witness in the instant case therefore irrevocably prejudiced the defense.

CONCLUSION

The federal questions presented by this appeal are substantial and of great importance to the administration of justice. It is therefore respectfully submitted that probable jurisdiction should be noted and determination of the merits expedited.

Respectfully submitted,

BECKERMAN, FRANZBLAU AND COHEN,
Attorneys for Appellant,
By: S. M. CHRIS FRANZBLAU.

APPENDIX

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

(A 1689-69)

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BERNARD R. LAFER,

Defendant-Appellant.

Argued November 9, 1970. Decided Jan. 20, 1971

Before Judges Goldmann, Leonard and Mountain

On appeal from the Essex County Court

Mr. Harold Friedman argued the cause for appellant (Messrs. Clapp and Eisenberg, attorneys; Mr. Jerome C. Eisenberg, of counsel)

Mr. David S. Baime, Assistant Prosecutor, argued the cause for respondent (Mr. Joseph P. Lordi, Essex County Prosecutor, attorney)

PER CURIAM

This is an appeal from a conviction of embezzlement pursuant to N.J.S.A. 2A:102-5.

Per Curiam Opinion of Superior Court of New Jersey, Appellate Division

Defendant is a member of the bar. He represented Concepcion Rivera and her son, George, as plaintiffs in a negligence action. The suit was settled for $10,000. Of this amount $6,000 was allocated to George, an infant, to be paid to his mother, Concepcion, as guardian. The balance was payable to the mother, individually. Defendant was allowed a counsel fee of $2,500, presumably payable from the mother's share. Checks totaling $10,000 were received and deposited in defendant's trust account. In the meantime, an application having been made, an order was entered July 26, 1967 by the Surrogate appointing Concepcion as guardian of her son, fixing bond in the nominal amount of $1,000 and directing that the $6,000 payable to George be deposited in the Robert Treat Savings and Loan Association until the further order of the court and subject to the control of the court. Instead of making this deposit as directed, defendant used the funds for his own purposes. In June, 1969 Concepcion paid a visit to Judge Giuliano, the Assignment Judge of Essex County. As a result of this visit, Judge Giuliano summoned defendant, directed him to return the money and indicated that he intended to communicate with the county Ethics Committee and with the Prosecutor. Shortly thereafter defendant delivered to Concepcion a certified check for $6,224.60. Indictment followed shortly thereafter.

Defendant testified that about the time he received the $10,000, Concepcion Rivera advised him that she was the recipient of welfare funds. He told her that if that were so it would be necessary to secure a clearance before the monies could be disbursed, since the Welfare Department had a lien on the funds under a statute. He said

this might take some time to work out and requested that he be personally allowed to use the money for his own purposes in the meantime, paying five per cent interest. Mrs. Rivera acquiesced, allegedly signing a letter dated October 12, 1967 to that effect. Lafer had some communication with attorneys representing the Welfare Department with no positive result and when, almost two years later, he was directed by Judge Giuliano to return the money, did so. He further testified that at the time he "borrowed" the money, he explained what he was doing to his father who expressed a willingness to guarantee payment. His father testified that such an arrangement had in fact been made.

The totality of the evidence at the close of the case was such as to justify the Assistant Prosecutor in making the following points in summation:

(1) Mrs. Rivera was not a recipient of welfare payments in October 1967 when the aforementioned letter was ostensibly written. She first applied for such relief in December, 1967, and received her first payment the following month, January 1968. Hence the State suggested the letter may not have been written in the autumn of 1967, but at some much later date when a need for it had become apparent.

(2) The total of all payments made by defendant to Mrs. Rivera, including the check for $6,224.60, was somewhat more than the amount "borrowed" plus interest. The jury was invited to consider this fact in conjunction with (1) above.

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

At the conclusion of the State's case defendant moved for an acquittal and the motion was denied. This ruling is assigned as error.

Embezzlement, or retaining or taking money with intent to defraud, N.J.S.A. 2A:102-5, requires a showing that the funds have come into defendant's hands properly and that thereafter, with intent to defraud, he has retained or converted them to his own use. *State* v. *Daly,* 38 N. J. 1 (1962); *State* v. *Bobbins,* 35 N. J. Super. 494 (App. Div. 1955), aff'd 21 N. J. 338 (1956), app. dismissed 352 U. S. 920 (1956); *State* v. *Hubbs,* 70 N. J. Super. 322 (App. Div. 1961). The State showed that the $10,000 payment in settlement of the negligence action reached defendant and was deposited in his trustee account, that $6,000 of this amount consisted of trust funds to be held by Mrs. Rivera as guardian of her son and that a court order—procured by defendant as attorney for the guardian—had been entered directing the deposit of the money in the savings and loan association subject to court control. It further showed that these funds had not been so deposited and that defendant's trustee account was thereafter frequently overdrawn. Finally, the State's proof revealed that repayment had been forthcoming only after Mrs. Rivera had sought assistance from the Assignment Judge of the county—some two years later.

The defense contends that these proofs were insufficient to establish a *prima facie* case because they did not show that retention of the monies by defendant was without authority of the guardian. The argument is captious. The proofs showed that the guardian had been directed

by the court to deposit the funds in a certain account. She was obligated to do this and was legally powerless to authorize any other disposition of the money. This was perfectly well known to defendant who was acting as Mrs. Rivera's counsel and who undertook and directed every step of the arrangement that placed the monies in his hands. Proof that the funds reached defendant's hands and were not thereafter within a reasonable time deposited as had been directed, supported by evidence as to the state of defendant's trustee account and the testimony of Judge Giuliano, was not "insufficient to wararnt a conviction." R. 3:18-1; *State* v. *Reyes,* 50 N. J. 454, 458 (1967). The denial of defendant's motion was entirely proper.

Next it is forcefully urged that the testimony of Judge Giuliano, entered over defendant's objection, constituted prejudicial error. The Judge testified that following an interview with Mrs. Rivera, he called defendant into his chambers, reported what he had been told by Mrs. Rivera and then continued,

> Well, I told Mr. Lafer that I intended to send the matter to the Ethics Committee, and ask the Prosecutor to proceed unless something was done. I then advised Mr. Lafer that I did not want him to give me an explanation unless he wanted to willingly. I said to him, "I am just advising you as a Judge to a lawyer," and then I added, "It seems to me that there is no reason why this woman should not have received her $7500." Then I said to him, "I am just advising you and I will contact [the secretary of the Ethics Committee] myself that we have been advised of this."

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

He further recounted that defendant's only reply was, "Is she coming back tomorrow morning?"

The testimony was both relevant and competent; the only question is whether it was unduly prejudicial. Immediately following the reception of this evidence the trial stated to the jury,

> Ladies and Gentlemen, I will inform you now and I will mention this again in my charge, that you are not to draw any inferences against the defendant simply because a judge of this court stated that he was sending the matter to the Ethics Committee and in turn to the Prosecutor. That does not in any way, shape or form imply guilt on the part of the defendant. It was admitted solely for the purpose of a presentation of what transpired and what may have then come after.

Substantially the same statement was repeated in the Court's charge. Finally, by way of supplement to the principal charge and at the specific request of defense counsel, the trial judge added,

> Ladies and gentlemen of the jury, you will bear in mind, of course, that the charge in this case is the criminal charge of embezzlement. This defendant is not being tried on the question of whether he is a good or competent lawyer, or a poor or incompetent lawyer. He is not being tried on the question of whether he followed or did not follow the ethical standard of a lawyer.

We deem the curative instruction, fortified by repetition in the charge and as clarified by the statement last above

quoted as having sufficiently exercised or neutralized any unfair prejudice which might have otherwise existed. If we are to believe in the jury system, as we do, we must believe a jury to be capable and willing to react responsibly to so clear and definite an admonition.

It is contended that the comments of the Assistant Prosecutor in summation made in reference to defendant's failure to offer an explanation of his conduct when charged with dereliction by Judge Giuliano were improper. Here the attack is upon the doctrine of assenting silence, a rule which has admittedly been widely criticized in recent years. See, for example, *State* v. *Butler,* 32 N. J. 166, 181-184 (1960), *cert.* denied 362 U. S. 984 (1960); *State* v. *Ripa,* 45 N. J. 199, 203 (1965); *State* v. *Kobylarz,* 44 N. J. Super. 250 (App. Div. 1957), certif. denied 24 N. J. 548 (1957); *State* v. *Garcia,* 83 N. J. Super. 345, 352-359 (App. Div. 1964). These, however, are cases where, at the time the accusatory statement was made, defendant was under arrest or in custody. Such, of course, was not the case here. Furthermore, the prerequisites to admissibility set forth in *Kobylarz* (at 259) and repeated in *Garcia* (at 354) were clearly present. Moreover we do not agree with the defendant that a private colloquy between a judge and a member of the bar, such as took place here, provides an occasion for the invocation of the criticism which has very properly resulted in attenuating the force and scope of the doctrine of assenting silence when applied to the kind of in-custody situation to be found in the authorities cited above. Accordingly we conclude that this argument is without substance.

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

We have carefully reviewed the entire record, having in mind defendant's argument that the State's handling of Concepcion Rivera improperly and unfairly prejudiced defendant and we conclude that the contention is without merit. Specifically, defendant was not entitled to a charge that the failure of the State to call Mrs. Rivera would justify an inference that this failure was occasioned by fear that her testimony would be unfavorable. *State* v. *Clawans,* 38 N. J. 162, 170 (1962). She was as available to one party as to the other and in fact the Assistant Prosecutor offered to produce her should the defense decide to call her as its witness. The offer was declined. The record reveals no impropriety on the part of the State.

We have also examined carefully the other grounds of appeal that have been urged before us and find none of them to offer any valid ground for reversal.

Accordingly, the judgment of the trial court is affirmed.

Order Denying Petition for Certification of the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY

C-306 September Term 1970

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

BERNARD R. LAFER,

Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 15th day of March, 1971.

(Illegible)
Acting Clerk of the Supreme Court

Notice of Appeal to the Supreme Court of the United States

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A 1689-69

STATE OF NEW JERSEY,

Plaintiff-Respondent

vs.

BERNARD R. LAFER,

Respondent-Appellant

Notice is hereby given that Bernard R. Lafer, the Respondent-Appellant in the above captioned matter, does hereby appeal to the Supreme Court of the United States from the final Order of denial of certification from the Supreme Court of the State of New Jersey dated March 15, 1970, and from the final Order of the Superior Court of the State of New Jersey, Appellate Division, affirming the judgment of conviction entered in the Superior Court of New Jersey, Law Division, on May 14, 1970. This appeal is taken pursuant to Title 28 of the United States Code, Section 1257 (3).

Pursuant to the provisions of Rule 12 (1) of the Rules of the Supreme Court of the United States, the Clerk of

this Court is requested to certify and transmit to the Supreme Court of the United States the entire record of the proceedings herein.

BECKERMAN, FRANZBLAU AND COHEN
Attorneys for Respondent-Appellant
By: S. M. CHRIS FRANZBLAU

Dated: April 1, 1971

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IN THE

Supreme Court of the United States

1971 Term

SUPREME COURT, U.S.
FILED
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E. ROBERT SEAVER, CLERK

No. 70-275

BERNARD LAFER,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH P. LORDI,
Essex County Prosecutor,
Attorney for Respondent,
Essex County Courts Building,
Newark, New Jersey, 07102.

DAVID S. BAIME,
Assistant Prosecutor,
Of Counsel and on the Brief.

Action Press Corp., 31 Commerce Street, Newark, N.J.—Market 3-0242

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IN THE

Supreme Court of the United States

1971 TERM

No.

BERNARD LAFER,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

The respondent, State of New Jersey, accepts the Statements of Opinion Below and Jurisdiction contained in the brief submitted by petitioner, except as supplemented or contradicted *infra*.

Statement of Case

Petitioner, a member of the New Jersey Bar, was convicted under an indictment charging him with embezzlement contrary to the provisions of N.J.S.A. 2A:102-5. His conviction was subsequently affirmed by the New Jersey Superior Court, Appellate Division, and his petition for certification was thereafter denied by the New Jersey Supreme Court.

The State's proof at trial disclosed that petitioner had represented one Concepcion Rivera and her son, George, in a negligence action before the Superior Court, Law Division, and on July 26, 1967, had recovered a judgment in the sum of $10,000.00. The proceeds of the judgment were to be divided in accordance with an order entered by the Essex County Surrogate's Court which provided that George Rivera was to receive $6000.00. In addition, the sum of $1500.00 was to be given to Concepcion Rivera as the parent's share and petitioner was to receive $2500.00 as his attorney's fee.

On August 2, 1967, Mr. Lafer filed a petition in the Surrogate's Office reciting the circumstances surrounding the entry of the judgment and stating that the proceeds were free and clear of all legal liens and encumbrances. Letters of guardianship were thereafter issued to Concepcion Rivera and an order was entered by the Surrogate's Court requiring her to deposit $6000.00 which constituted George's share of the judgment, in the Robert Treat Savings and Loan Association. The order further provided that no withdrawals could be made without prior court approval and required that a certificate of deposit be filed with the Surrogate's Office. It is uncontroverted that the certificate of deposit was never filed with the Court and that the proceeds of the judgment were not

deposited in the Robert Treat Savings and Loan Association until August 22, 1969, when an account was opened in the name of Concepcion Rivera in the sum of $5400.00.

Further evidence was offered by the State concerning the manner in which the judgment was paid. The State's proofs disclosed that one check was issued by the American Mutual Insurance Co. and two drafts by the Fidelity and Casualty Co. The draft from American Mutual in the sum of $2500.00 was made payable to the order of Concepción Rivera as guardian and petitioner as trustee and was deposited in Mr. Lafer's trustee account on October 24, 1967. One draft, dated October 5, 1967, drawn on the account of Fidelity and Casualty Co., was in the sum of $4500.00 and was made payable to the order of Concepcion Rivera as guardian and petitioner as trustee. This draft was deposited in petitioner's trustee account on October 15, 1967. The third draft in the sum of $3000.00 was made payable to Concepcion Rivera and petitioner and was deposited in Mr. Lafer's trustee account on October 13, 1967.

It is undisputed that shortly before depositing the drafts representing the proceeds of the Rivera judgment, petitioner's trustee account contained a balance of $536.00. After depositing the two drafts issued by Fidelity and Casualty Co. in the sum of $7500.00 on October 13, 1967, petitioner's trustee account totaled only $6964.00. It can be thus inferred that several prior outstanding checks had cleared petitioner's account during the interim. Petitioner's bank statements, produced by the State and introduced into evidence, indicated that Mr. Lafer's account was overdrawn on numerous occasions subsequent to the deposit of the proceeds of the Rivera judgment. On April 10, 1968, for example, there was a minus balance of $687.74 On April 24, 1968, the account was overdrawn in the

sum of $1538.10. On May 9, 1968, overdrafts totaled more than $2234.00.

James R. Giuliano, the Assignment Judge in Essex County, testified that on June 2, 1969, he called petitioner to his chambers for a conference and advised him that he had received a complaint from Mrs. Rivera that she had not received any part of the settlement. Judge Giuliano then asked petitioner whether he had any explanation as to why Mrs. Rivera had not received the proceeds of the settlement. Petitioner did not reply to the Judge's query and offered no reason for the apparent violation of the law. Petitioner was then directed by Judge Giuliano to tender a certified check to Mrs. Rivera no later than June 3, 1969. At the conclusion of Judge Giuliano's testimony, the trial court instructed the jury not to draw any inference against petitioner merely because he had been called before the Assignment Judge on the basis of alleged violations of legal ethics.

The State then introduced into evidence a check dated June 10, 1969, drawn on petitioner's trustee account and made payable to the order of Concepcion Rivera as guardian. The check was in the sum of $6224.60 and was certified on June 11, 1969.

At the conclusion of the State's case, petitioner moved for a judgment of acquittal. After a thorough review of the evidence and extended argument by counsel on both sides, the trial court denied petitioner's motion, stating that a *prima facie* case of embezzlement had been presented.

Petitioner took the stand in his own behalf and testified that he had been a member of the bar for approximately fifteen years. He did not dispute the fact that he had received three drafts from the two insurance compan-

ies involved and had not deposited the proceeds of the judgment in the Robert Treat Savings and Loan Association as required by the order of the Surrogate's Court. According to his testimony, this omission was the product of an agreement with Mrs. Rivera, whereby he was given the right to use the money for his own purposes at an interest rate of five per cent. It is undisputed that the money was used to pay his mortgage and other personal debts.

Petitioner further testified that it was his belief that Mrs. Rivera was a welfare recipient and that the Essex County Welfare Board possessed a lien on the proceeds of the judgment. He admitted, however, that he never took steps to determine whether a lien on the proceeds of the judgment, in fact, existed. Petitioner further admitted that he had prepared a petition which was filed in the Essex County Surrogate's Court stating that the proceeds of the judgment were free and clear of all liens. Additionally, petitioner never issued a receipt to Concepcion Rivera for the money that he had allegedly borrowed and never advised Judge Giuliano concerning his alleged agreement with his client or about the possibility that a lien existed on the proceeds of the judgment.

The State produced Abe R. Brotspies as a rebuttal witness. Mr. Brotspies testified that he was employed by the Essex County Welfare Board as a supervisor. According to his testimony, Concepcion Rivera first applied for welfare on December 7, 1967 and received her first check on January 1, 1968. He further stated that the Welfare Board possessed no right to be reimbursed from the proceeds of the judgment absent an express agreement providing for the same. Since no such agreement existed with respect to Concepcion Rivera, there was no lien on the judgment proceeds. Contrary to petitioner's testi-

mony, Mr. Brotspies stated he had never spoken to Mr. Lafer before October 31, 1969. On that occasion petitioner called him on the telephone and stated, "I've got some money for you. Aren't you interested in getting some money?" Petitioner then informed Mr. Brotspies of the facts surrounding the Rivera judgment. Petitioner called Mr. Brotspies repeatedly thereafter always asking the same question.

At the conclusion of the case, the trial court instructed the jury with respect to the principles of law pertaining to the crime of embezzlement. The jury thereafter returned a verdict of guilty and sentence was imposed.

ARGUMENT

POINT I

Due process as guaranteed by the Fifth and Fourteenth Amendments was not denied petitioner by the admissions of testimony relating to his confrontation with Judge Giuliano.

Defense counsel first contends that the court below erred in permitting Judge Giuliano to testify as to the circumstances surrounding his conference with petitioner on June 2, 1969. At that conference, Judge Giuliano informed petitioner that Mrs. Rivera had come to his office that morning in reference to her son's case and had advised him that she had received no part of the settlement. Judge Giuliano then ordered petitioner to issue a certified check to Mrs. Rivera and further advised him of his intention to send the matter to the Ethics Committee. When the Assignment Judge asked petitioner for an explanation as to his failure to disburse the judgment proceeds, Mr. Lafer chose to remain silent.

At trial, defense counsel objected to Judge Giuliano's testimony relating to his confrontation with petitioner. More specifically, it was argued that the proferred testimony was "unduly prejudicial."

The trial court was not persuaded, however, and denied defense counsel's objection. Immediately thereafter, the court instructed the jury "not to draw any inferences against defendant simply because a judge . . . stated he was sending the matter to the Ethics Committee." The Court went on to state that the alleged ethics violation did not "in any way, shape or form imply guilt on the part of the defendant."

Petitioner argues that the admission of Judge Giuliano's testimony constituted a violation of this Court's decision in *Miranda* v. *Arizona,* 387 U. S. 486 (1966). More specifically, it is contended that the application of the doctrine of assenting silence constitutes a deprivation of due process of law under the Fifth and Fourteenth Amendments.

Petitioner's argument is totally devoid of merit. There is no question but that the doctrine of assenting silence has retained its vitality when applied to non-custodial interrogations where the accused does not possess the right to remain silent. In such situations, the compelling atmosphere inherent in the process of in-custody interrogation is not present. Moreover, it is abundantly clear that the privilege against self-incrimination is inapplicable with respect to interrogations conducted by private persons. See for example, *State* v. *Little,* 201 Kan. 94, 439 P. 2d 387 (Sup. Ct. 1968); *People* v. *Frank,* 52 Misc. 2d 266, 275 N. Y. S. 2d 570 (S. Ct. 1966); *Shaumburg* v. *State,* 83 Nev. 372, 432 P. 2d 500 (1967); *cf. United States* v. *Stonehill,* 254 F. Supp. 1003 (S. D. N. Y. 1966); *People* v. *Ran-*

dazzo, 220 Cal. App. 2d 768, 34 Cali. Rptr. 65 (1963); *Sackler* v. *Sackler,* 255 N. Y. S. 2d 83, 203 N. E. 2d 481 (1964). This being the case, silence in the face of accusatory questions propounded by persons other than law enforcement personnel is not protected by the Fifth Amendment.

Petitioner's reliance on *State* v. *Garcia,* 83 N. J. Super. 345 (App. Div. 1964) is clearly misplaced. *Garcia, supra,* involved the admission of evidence relating to a suspect's silence in the face of accusatory statements made while in police custody. *Id.* at 357. As noted by the Supreme Court of New Jersey in *State* v. *Ripa,* 45 N. J. 199, 203-204 (1965), when a person is in police custody:

> "(T)he right of a suspect to remain silent is a conspicuous and a likely explanation of his silence. That right could be nullified if a jury were permitted to infer the accused was silent because he acknowledged the truth of the accusation. Hence, our cases have quite clearly revealed dissatisfaction with the concept in that setting."

The Court went on to state that its decision was not intended to abrogate the doctrine of tacit admissions but that it still had efficacy with respect to non-custodial interrogations. *Id.* at 203-204. Also see *State* v. *Garcia, supra* at 357.

As noted, the courts of New Jersey have placed severe restrictions on the applicability of the doctrine of assenting silence. So restricted, the doctrine remains a valuable evidentiary principle in this State. That a state is free to adopt and formulate its own rules of evidence has recently been reaffirmed by the Court in *Dutton* v. *Evans,* —— U. S. —— (1970). It is, therefore, abundantly clear that petitioner's present application is without basis.

Even asuming, however, that non-custodial interrogations conducted by private persons fall within the ambit of *Miranda, supra,* constitutional principles were not violated in the instant case. The State's evidence concerning petitioner's silence in the face of accusatory remarks made by the Assignment Judge can in no way be considered a substantive admission of guilt or a confession protected by *Miranda.* To the contrary, this evidence was offered for a wholly different purpose. Judge Giuliano's testimony was admitted to prove that the tender of monies to Mrs. Rivera on June 10, 1969 was made by petitioner in response to a judicial order. Absent this testimony, the jury could have been misled into believing that petitioner satisfied his obligation to his client of his own free will. Such was not the case, however.

Any danger that the jury misconstrued the probative value and effect of this evidence was clearly obviated by the court's cautionary instruction on at least two occasions during the course of trial. It is fairly to be presumed that the jury complied with the trial court's admonition.

Equally unavailing is petitioner's claim that the prosecutor's comments made during his summation constituted error of constitutional dimension. While it is true that the prosecutor alluded to petitioner's silence in the face of Judge Giuliano's accusatory remarks, these comments were made to affect Mr. Lafer's credibility. It is to be noted in this regard that petitioner voluntarily took the stand in his own defense and claimed that it was his belief that the Essex County Welfare Board possessed a lien on the proceeds of the judgment. He further testified that he refused to disburse the judgment proceeds because he feared that the Welfare Board had some rights to

them. Despite this alleged belief, petitioner offered no explanation to the Assignment Judge for his failure to disburse the funds as required by the order of the Surrogate's Court. The prosecutor had every right to comment upon petitioner's silence in order to rebut Mr. Lafer's imaginative explanation of his conduct offered at trial.

This Court has only recently held that a statement made by a suspect during a custodial interrogation by law enforcement officers in violation of *Miranda, supra,* may nevertheless be introduced into evidence by the State on rebuttal to affect the defendant's credibility. See *Harris* v. *New York,* —— U. S. —— (1971). Here, petitioner took the stand and offered an explanation of his conduct that had not been previously to Judge Giuliano. The prosecutor's comments constituted an attack on petitioner's credibility. This being the case, even if *Miranda* has applicability to non-custodial interrogations conducted by private persons, petitioner's rights were in no way violated. His petition must therefore, be denied.

POINT II

The admission of Judge Giuliano's testimony was neither prejudicial nor a denial of petitioner's right to a fair trial.

Petitioner argues that the admission of Judge Giuliano's testimony as to his private conversation with Mr. Lafer was highly prejudicial and constituted a denial of due process of law.

Again, petitioner's claim is without merit. As previously noted, the Assignment Judge's testimony was of-

fered by the State to prove that the tender of monies to Mrs. Rivera on June 10, 1969 was not voluntarily made but was in response to the Assignment Judge's specific order and threat of sanctions. Absent this testimony, the jury could well have concluded that petitioner voluntarily fulfilled his obligation to his client. It was incumbent upon the State to prevent such a miscarriage of justice.

Petitioner claims that the admission of the Assignment Judge's testimony constitutes a violation of Rule 4 of the *New Jersey Rules of Evidence* which provides the pertinent part as follows:

> "The judge may in his discretion exclude evidence if he finds that probative value is substantially outweighed by the risk that its admission will either (a) necessitate undue consumption of time, or (b) create danger of undue prejudice or of confusing the issues or of misleading the jury."

In pursuing his argument, petitioner ignores the fact that the trial judge cautioned the jury with respect to the probative value of the evidence on three separate occasions. Immediately following the reception of the evidence, the trial judge stated to the jury:

> "Ladies and gentlemen, I will inform you now and I will mention this again in my charge, that you are not to draw any inferences against the defendant simply because a judge of this court stated that he was sending the matter to the Ethics Committee and in turn to the Prosecutor. That does not in any way, shape or form imply guilt on the part of the defendant. It was admitted solely for the purpose of a presentation of what transpired and what may have then come after."

Substantially the same cautionary instruction was repeated in the trial court's main charge. Finally, by way of supplement to the principal charge and at the specific request of defense counsel, the trial judge added:

> "Ladies and gentlemen of the jury, you will bear in mind, of course, that the charge in this case is the criminal charge of embezzlement. This defendant is not being tried on the question of whether he is a good and competent lawyer, or a poor or incompetent lawyer, he is not being tried on the question of whether he followed or did not follow ethical standards of a lawyer."

This curative instruction, fortified by repetition in the charge, neutralized any unfair prejudice which might have otherwise existed. Again, it is fairly to be presumed that the jury was capable of following the trial court's instructions.

Petitioner has attempted to couch his present claim in constitutional language in order to seek review by this Court. For example, he has seen fit to cite *Bruton* v. *United States*, 391 U. S. 123 (1967) in support of his argument. *Bruton* involved the admission of a co-defendant's confession and is totally inapposite to the factual pattern in the instant case. There is not a hint of an argument that cross-examination of any witness was denied or impaired in the case *sub judice*.

The admission of the Assignment Judge's testimony was within the discretion conferred on the trial court under Rule 4 of the *New Jersey Rules of Evidence* and does not constitute a question of constitutional moment.

An examination of the record below clearly reveals that petitioner was afforded a fair trial conducted in an impartial manner. His present claim of prejudice constitutes pure fantasy and is belied by the record below.

POINT III

Petitioner was supplied with a complete Grand Jury transcript consistent with the New Jersey Rules of Practice and was not deprived of his rights under the Sixth and Fourteenth Amendments.

Petitioner next contends that the failure of the State to provide him with a complete copy of the Grand Jury transcript constituted a denial of his rights under the Sixth and Fourteenth Amendments.

Again, the argument raised is not of constitutional dimension. As noted by the trial court, the Grand Jury transcript was available to defense counsel on December 12, 1969, four days prior to trial. The transcript consisted of five typewritten pages capable of being read in a very short period of time. The delay in presenting the transcript to petitioner was caused by the stenographer's absence from the State. The brevity of the transcript clearly belies petitioner's present claim of prejudice.

Equally unavailing is petitioner's argument that significant portions of the Grand Jury minutes were omitted. While it is true that Mrs. Rivera's letter was lost, it was read into the record by the Prosecutor during the Grand Jury proceedings. That petitioner was not prejudiced cannot seriously be disputed since the letter was exculpatory in nature and was used by defense counsel at trial. It is difficult to discern in what manner petitioner was prejudiced by the inadvertent failure of the State to produce the letter at or before trial. Surely, the issue raised here is not of public importance and does not merit this Court's time and attention.

POINT IV

The failure of the State to call Mrs. Rivera at trial in no way prejudiced petitioner's case.

Petitioner next contends that the Prosecutor's treatment of the complaining witness, Mrs. Rivera, effectively deprived him of the benefit of her testimony at trial. More specifically, it is contended that the conduct of the State in subpoenaing Mrs. Rivera and in failing to have her testify so coerced her so as to prevent the defense from calling her as its own witness.

The record below does not reveal any conduct on the part of the State which in any sense may be interpreted as having the effect of preventing the defense from calling Mrs. Rivera as its own witness at trial. The right of the State to subpoena Mrs. Rivera and to confer with her prior to trial cannot seriously be questioned. Moreover, it was clearly not incumbent upon the State to produce at trial a witness for whose credibility it could in no way vouch and who had expressed a wish to assist the petitioner.

Contrary to petitioner's assertion contained in his brief, Mrs. Rivera's decision to refuse to cooperate with the defense was not caused by the State. In an affidavit submitted after the trial, Mrs. Rivera stated that she had promised to call Mr. Lafer at 1:30 P.M. on December 18, 1969, in the event he wished her to testify in his behalf. Nevertheless, Mrs. Rivera deliberately failed to call defense counsel because she was "afraid she might be implicated in a fraud by failing to notify the Welfare Board of the settlement" and "afraid of losing these monies" if she were to testify.

Nowhere in the affidavit does Mrs. Rivera state that she would not have testified favorably for the defense if called as a witness. In fact, the record below belies the contention that Mrs. Rivera was not available to the defense. At one point during the trial, the defense represented that it intended to call Mr. Rivera as its witness. In spite of this express representation petitioner later elected not to call her although the Prosecutor stated she could be produced very quickly. Defense counsel at that time stated, " I am not putting in such a request." The State submits that the Prosecutor fulfilled his duty and was under no obligation to produce Mrs. Rivera at trial. The petitioner was not prejudiced due to the fact that she was at all times available to the defense, which finally elected not to call her as a witness. See *State* v. *Clawans,* 38 N. J. 162, 173 (1962).

In summary, the record below does not support petitioner's present claim. The State did not actively conceal exculpatory evidence, but decided not to call Mrs. Rivera as a part of its case in chief. A prosecutor may sensibly decide for various reasons not to present all evidence in his possession concerning the guilt of the accused. See *State* v. *Murphy,* 36 N. J. 172, 178 (1961) reversed on other grounds 378 U. S. 52 (1964). In any event, petitioner's defense was not prejudiced by any conduct on the part of the State.

CONCLUSION

None of the arguments advanced by petitioner in this application for a Writ of Certiorari is of constitutional dimension. Nor are the questions raised of public importance. In fact, petitioner was afforded a fair and impartial trial. For the foregoing reasons, the respondent,

State of New Jersey, submits that a petition for a Writ of Certiorari to the Superior Court, Appellate Division should not be granted.

Respectfully submitted,

JOSEPH P. LORDI,
Essex County Prosecutor,
Attorney for Respondent.

DAVID S. BAIME,
Assistant Prosecutor,
Of Counsel and on the Brief.